SUPREME COURT, U. S.
JAN 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

NO. 73 763

CARL E. HIGHTOWER,)
)
Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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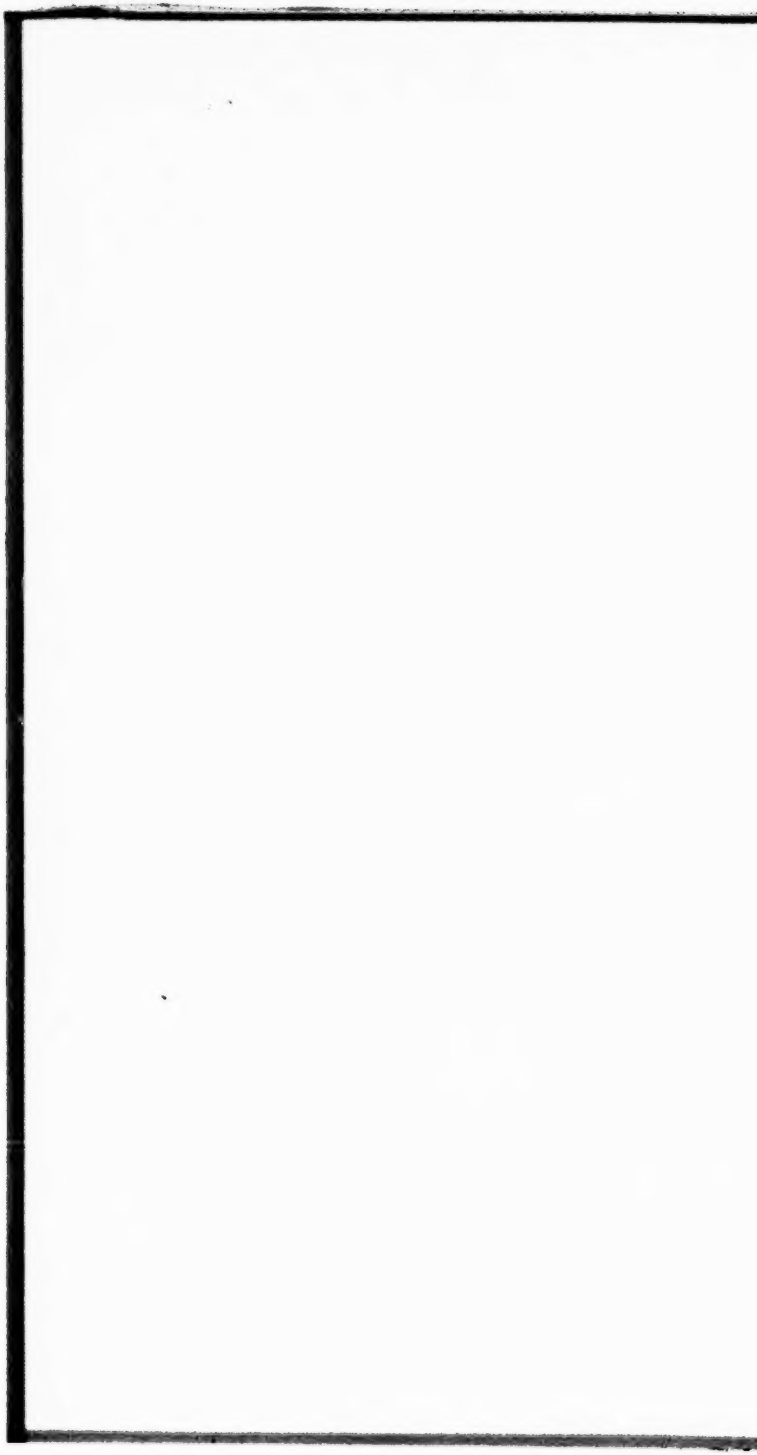
TABLE OF AUTHORITIES

Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476. 13

Chapman v. California (1969) 386 U.S. 18, 87 S.Ct. 824, 17 LEd.2d 705. . . 6, 11

Jackson v. Denno, 378 U.S. 368, 12 L.Ed. 2d 908, 84 S.Ct. 1774. 13

Krulewitch v. U.S., 336 U.S. 440, 453, 93 L.Ed. 790, 799, 69 S.Ct. 716. 12



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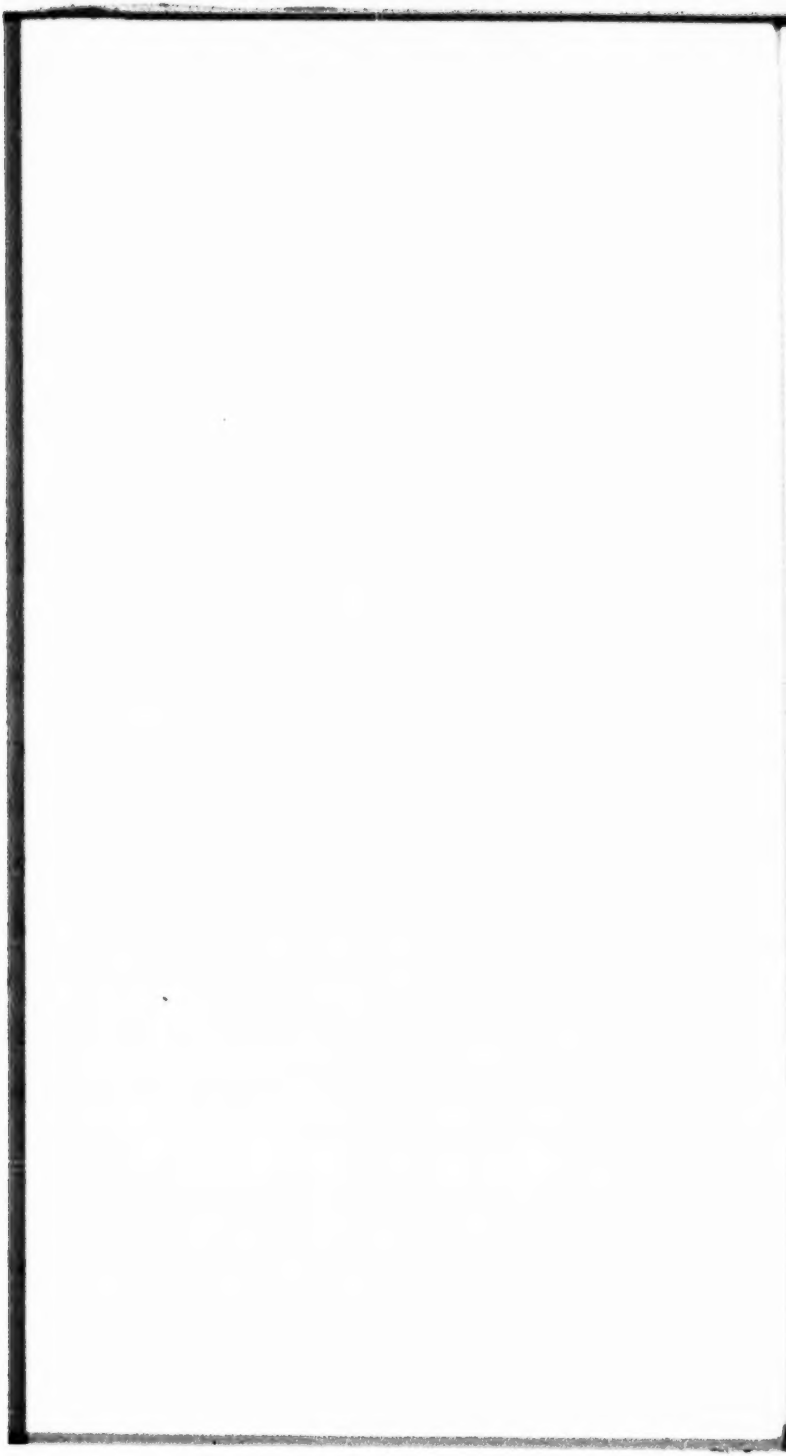
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

Carl E. Hightower, by counsel, Forrest Bowman, Jr., prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Indiana affirming petitioner's judgment of conviction on the 1st day of June, 1973, and the denial of his Petition for Rehearing denied on the 13th day of August, 1973

OPINIONS BELOW

The opinion of the Supreme Court of the



State of Indiana has not yet been officially reported. It is reproduced in Appendix "A" of this petition.

JURISDICTION

1. The judgment of the Supreme Court of Indiana was entered on June 1, 1973. See Apendix "A". Petition for Rehearing was filed in the Indiana Supreme Court on June 19, 1973, and was denied on August 13, 1973. Said denial of Petition for Rehearing was final by its terms.

2. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

When a state court defendant complains that he was denied a fair trial by prosecutorial misconduct which resulted in the trial jury hearing substantial inadmissible evidence that was subsequently striken, may the State reviewing court deny relief by characterizing the question as one of general fairness not concerned with constitutionally guaranteed

rights and thereby refuse to apply federal law with respect to the question of harmless error.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT 5

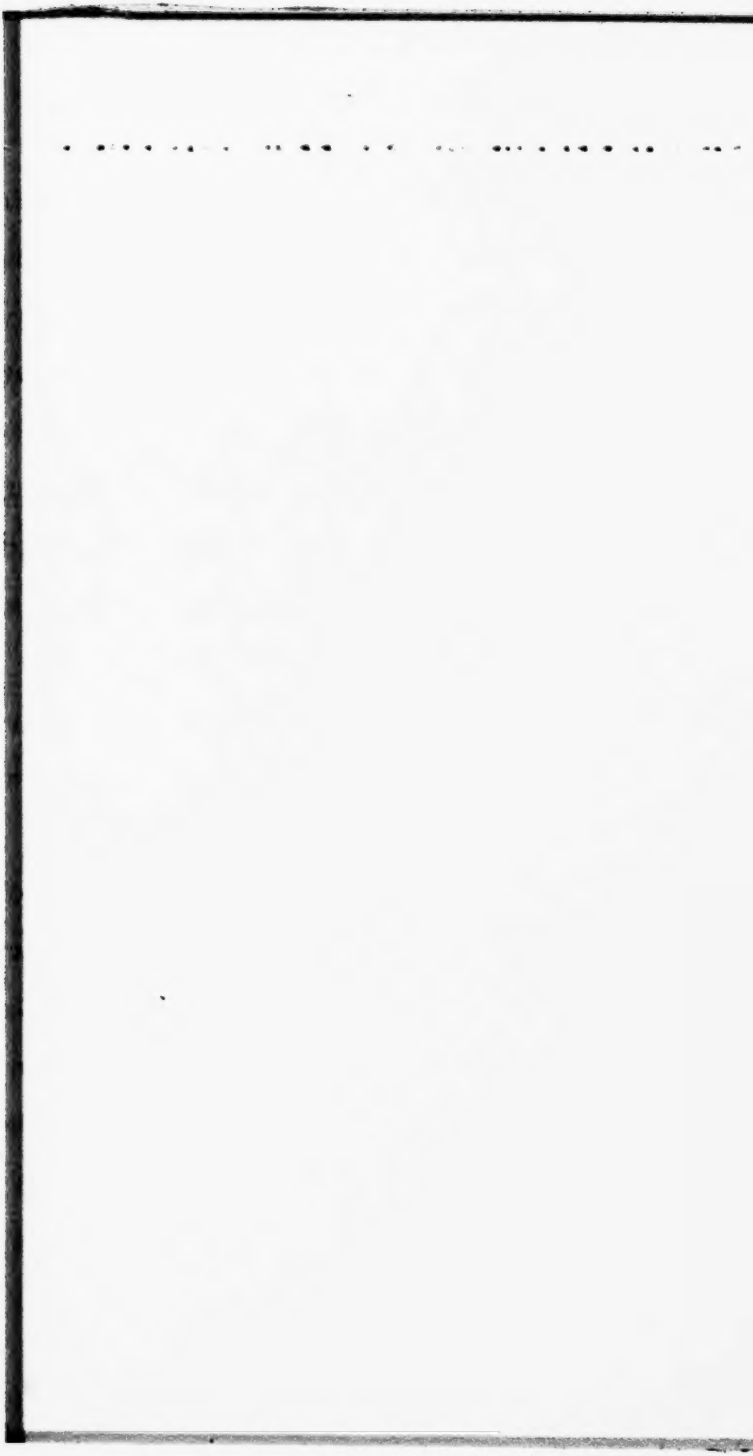
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION, AMENDMENT 14, §1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioner was prosecuted by affidavit in the Circuit Court of Owen County, Indiana. The charges were contained in two affidavits. Cause number 8716 charged him with the offense of rape in Count One and the offense of assault and battery with intent to gratify sexual desires under County Two. The rape was alleged to have been committed upon one Brenda May Gentry, a female child of the age of eleven years. The assault and battery with intent to gratify sexual desires was alleged to have been committed upon one Rebecca Lynn Centry, a child of the age of fifteen years. The second affidavit bearing cause number 8717 was in one count and charged the defendant with the crime of rape upon Rebecca Lynn Centry, a female child of the age of Fifteen years. The causes were consolidated for trial by agreement of the parties and

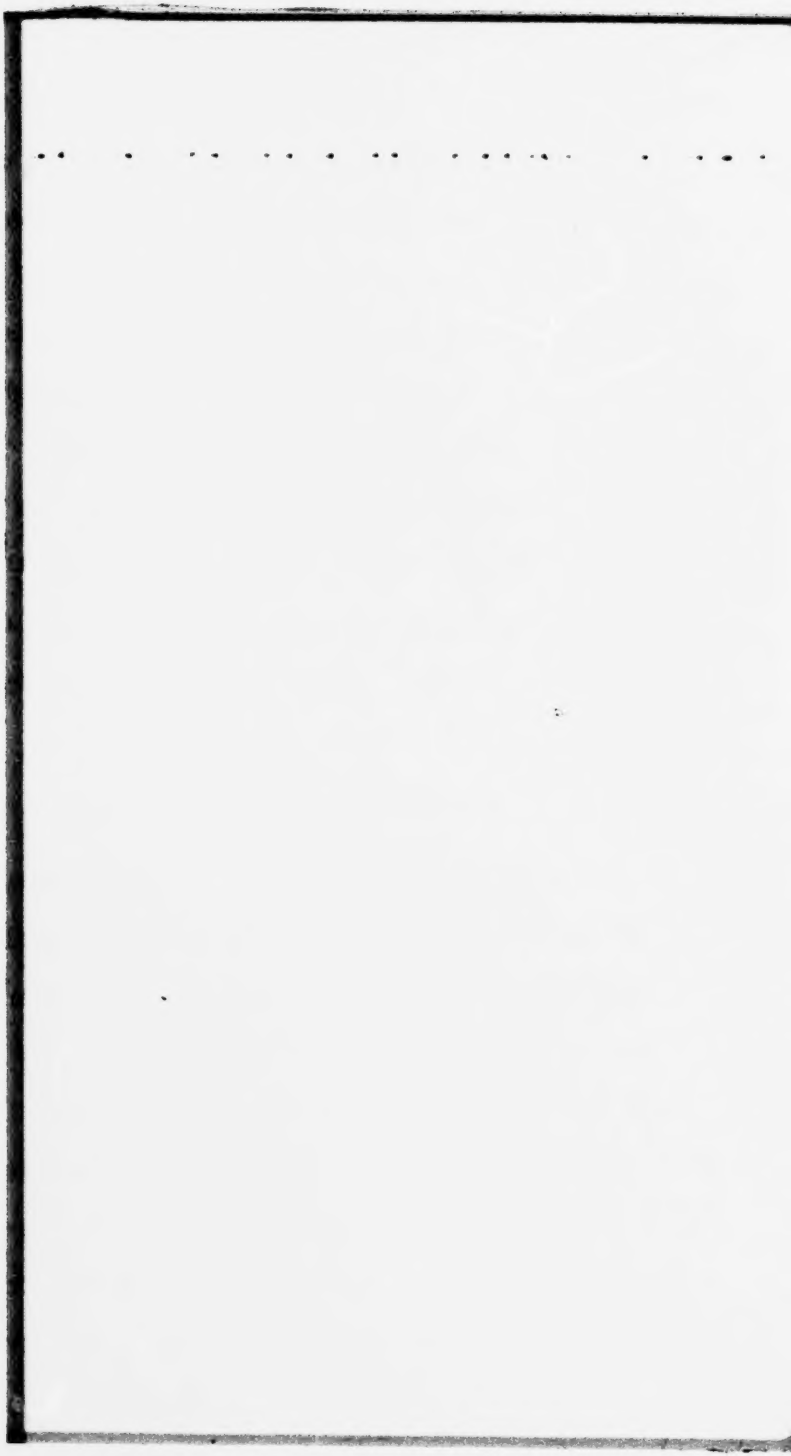


were submitted to trial by jury. On the trial of the cause the defendant was acquitted of both counts under cause number 8716 and was convicted of rape under cause number 8717.

Thereafter, the defendant timely filed his Motion to Correct Errors which was subsequently overruled by the trial court. The petitioner appealed his conviction to the Supreme Court of Indiana which affirmed the conviction. The petitioner timely filed a Petition for Rehearing which was denied by the Supreme Court of Indiana.

HOW THE FEDERAL QUESTION WAS RAISED

The Federal question was specifically raised for the first time during the trial by trial counsel who stated that the defendant was not being granted a fair trial by reason of the prosecutorial misconduct. This appears at transcript page 372 and page 373. The point was raised again at transcript page 383 when trial counsel moved for a mistrial for the reason that the prosecutor was deliberately disregarding the court's



instructions regarding the admissibility of evidence and was deliberately seeking to put into evidence that which he knew to be improper for the purpose of prejudicing the jury against the defendant. Counsel observed that it had been done on so many occasions that the defendant could not have a fair trial.

The question was raised in the Appellants Brief when it was argued that the defendant had been denied a fair trial by reason of prosecutorial misconduct.

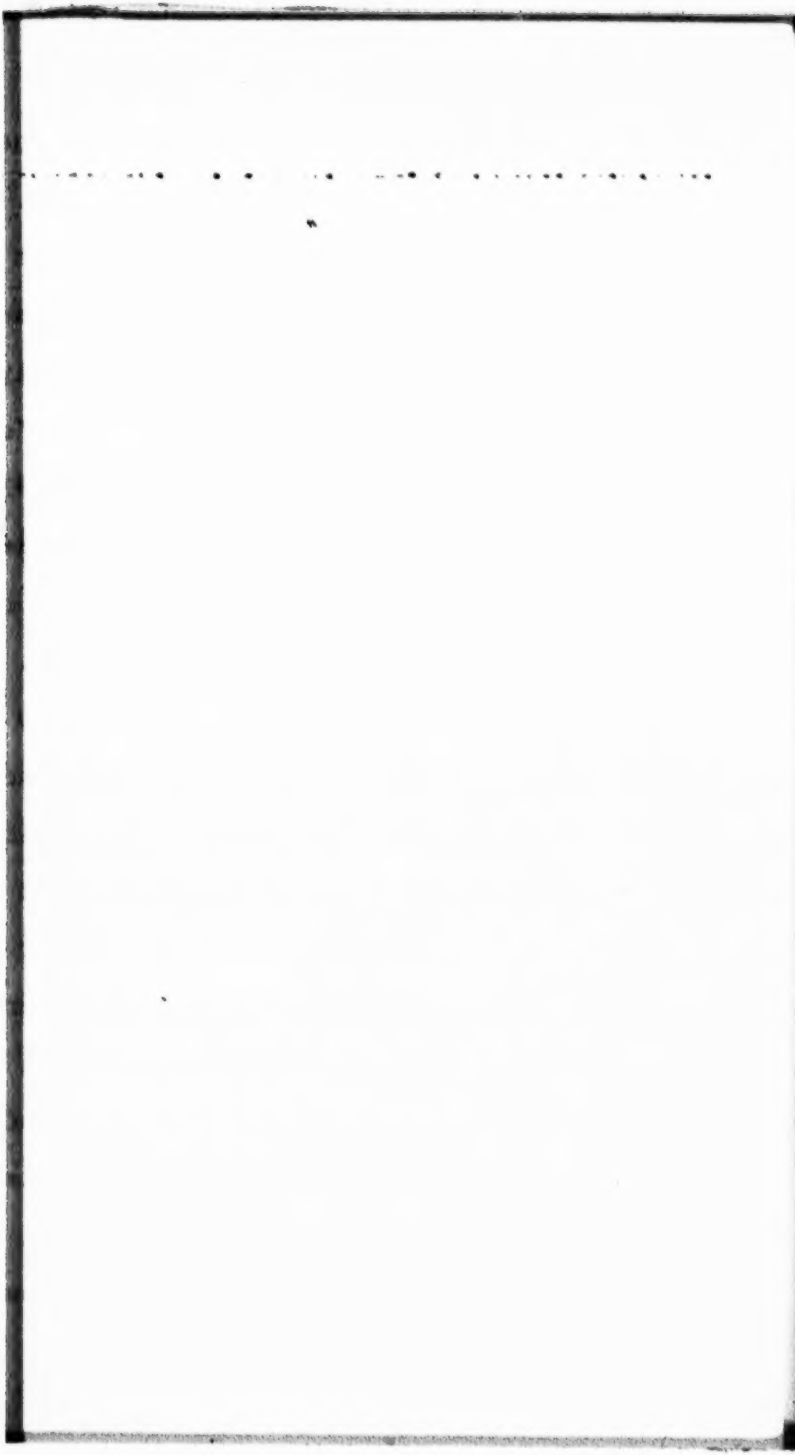
Petition for rehearing alleged that the opinion of the Supreme Court of Indiana affirming the conviction below denied the defendant due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and was contrary to the holding of the United States Supreme Court in Chapman v. California (1969) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705.

REASONS FOR GRANTING WRIT

The Supreme Court of Indiana has decided petitioner's Federal question adversely to him in a manner not in accord with applicable decisions of this court.

During the trial of this cause, on approximately forty occasions the prosecutor asked questions that were leading, sought to elicit hearsay, or were otherwise improper. In every case the defendant objected and the court sustained the objection. Unfortunately, in many instances the witness responded with answers that were improper and often prejudicial, thus requiring an admonition by the court that the jury should disregard the prejudicial material. Several of the improper questions were asked in series, and on one occasion there were approximately eight improper questions asked in succession. On another

occasion the impropiety was so obvious that the court interrupted on it's own motion. (Appellant's Brief, page 62) On at least six occasions, the prosecutor intentionally sought to elicit hearsay evidence that was highly prejudicial to the defendant. (Appellant's Brief, pp. 65, 68-69, 69, 82-83, 85, 88-91) At one point in the trial a young girl was called to testify that she had been molested by an elderly man in the park in a nearby city. She was not one of those persons named in the affidavits. The testimony was offered under the theory that sex crimes are an exception to the general rule that other misconduct of the defendant may not be shown. After the young girl testified to the circumstances of her being molested, she testified that the defendant was not the man who molested her. Nevertheless, the prosecutor called as his next witness the mother of the young girl who was in the park the following day when the

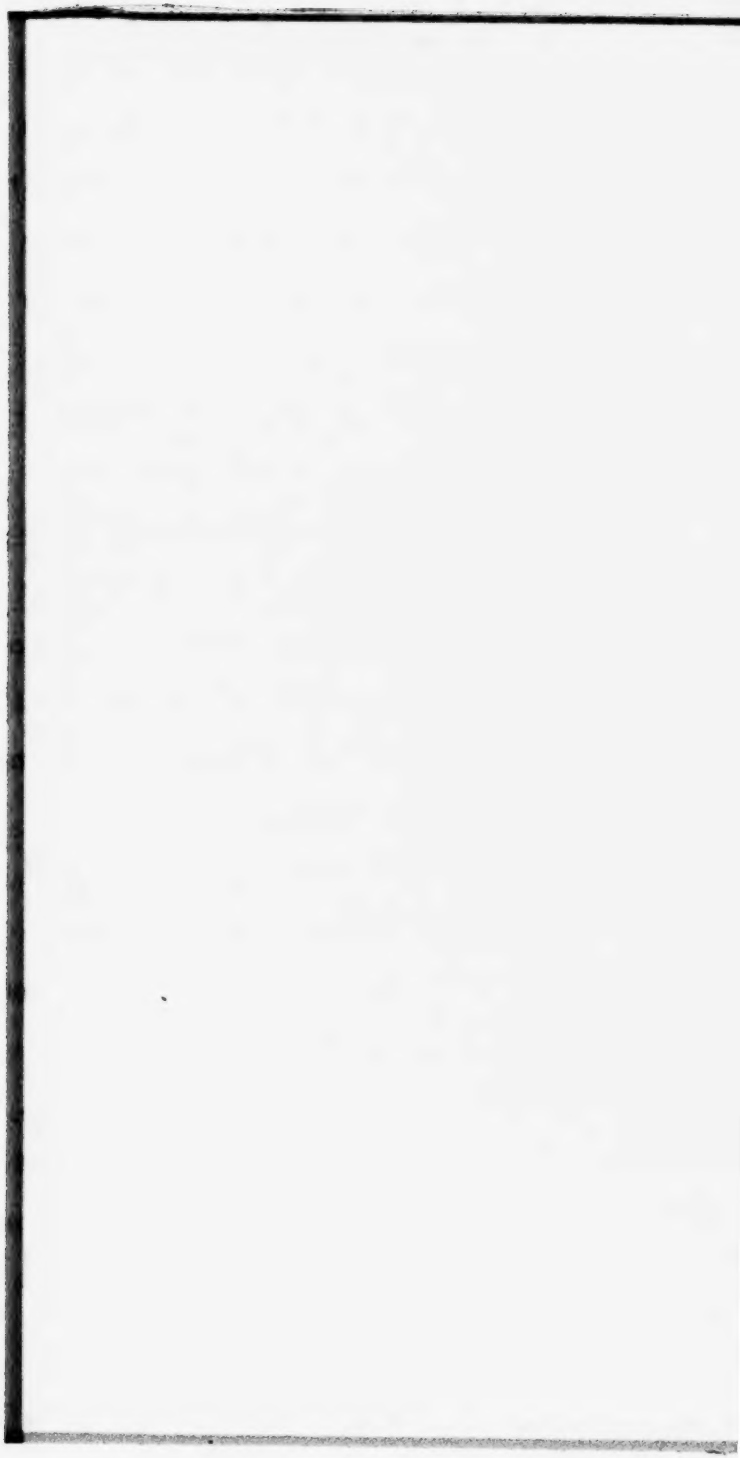


defendant in the instant case was arrested, apparently on suspicion of being the man who had done the molesting the day before. By eliciting hearsay testimony from the mother, he was able to create the impression that the defendant was the man who had molested the little girl, notwithstanding the testimony of the little girl that he was not. The mother became so emotional on the witness stand that she had to be ordered out of the courtroom and her cross examination had to be deferred. This witness was followed to the stand by the police detective who had arrested the defendant the day following the molestation of the little girl who first testified. The officer testified to the arrest of the defendant and also volunteered that the defendant had not appeared in court on that case and that at the time of his arrest he was wanted by the police in Spencer, Indiana.

At the hearing on the Motion to Correct Errors the trial judge observed that he did not think he could prevent the misconduct of the prosecutor in a retrial and it was pointless therefore to grant a new trial. (Appellant's Brief, p. 91). The opinion of the Indiana Supreme Court observed that the defendant relied upon the aspect of due process concerned with the general area of fairness in the proceedings of a trial. The court went on to say that these instances, which supported the defendant's mistrial motion, were not errors committed by the trial court but were irregularities during the course of trial. The court observed that the trial court had always promptly stricken the improper material and admonished the jury to disregard it and that it would not be proper for the Supreme Court of Indiana to substitute it's sense of fairness for that of the jury's. The court stated that when irregularities such as the ones complained of herein are the grounds

of the appeal there is a strong presumption that the jury was able to follow the admonitions of the trial court to disregard any hastily given evidence. The opinion stated that in cases involving simple irregularities such as those complained of by this defendant, the court could rely on a lower level of assurance concerning the impact on the jury because the likelihood of their effect on substantial rights is much less. It imposed upon the defendant the burden of demonstrating that the irregularities had a discernible and apparent effect on the verdict.

The harmless error test applied by the Indiana Supreme Court in this case denies the defendant his constitutional right to due process of law and is in contravention of the test laid down in the case of Chapman v. California (1969), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705. The Chapman case stated that before a federal constitutional error can be held harmless, the court must be able to



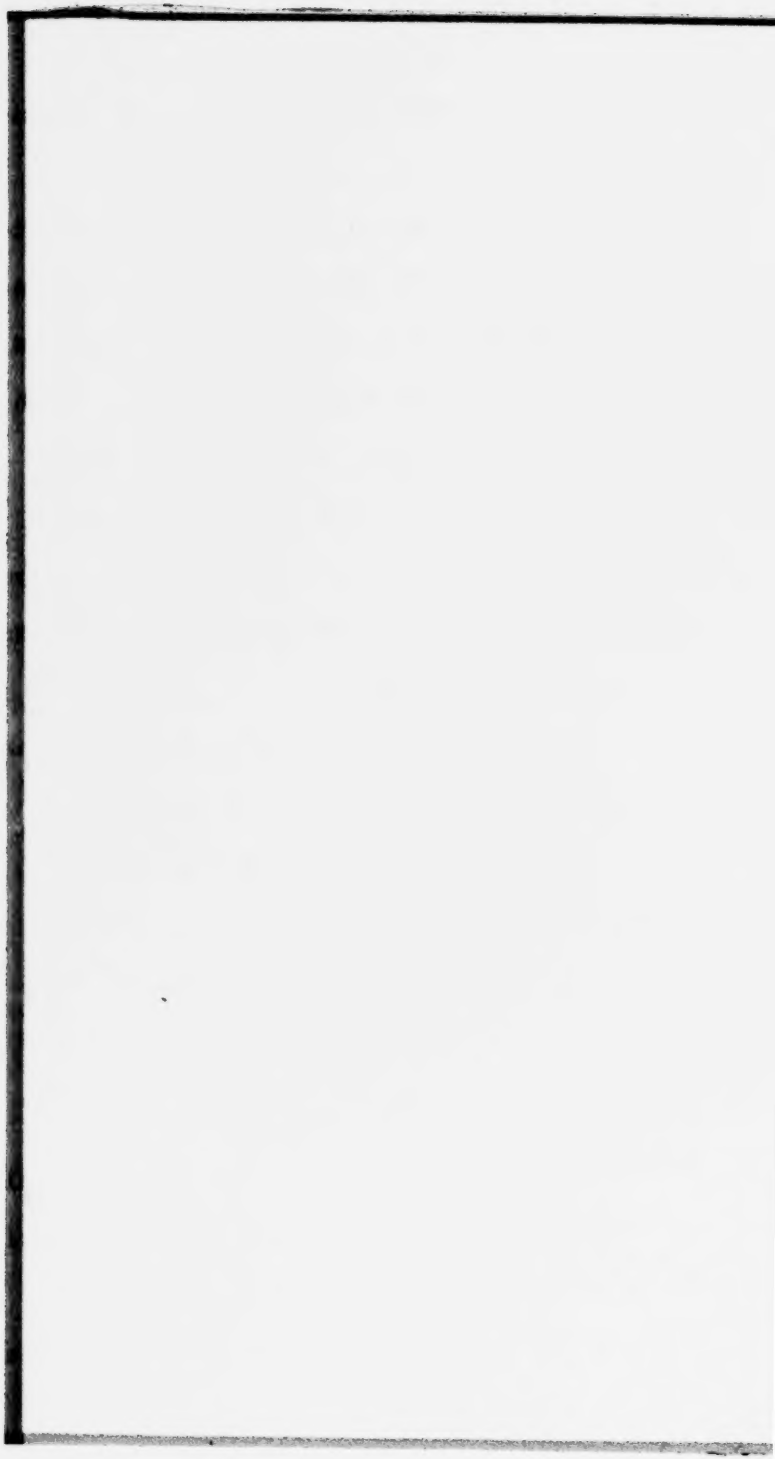
declare a belief that it was harmless beyond a reasonable doubt.

The Indiana Supreme Court has sought to avoid the application of this rule by characterizing the misconduct of the prosecutor as less than a constitutional violation. This technique is pure tautology. If the behavior affected the jury, it denied the defendant due process of law. It is therefore improper to determine the impact by any standard other than the federal standard.

In this regard it has been observed that it is very unlikely that a jury disregards prejudicial evidence even when instructed to do so.

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury. . .all practicing lawyers know to be unmitigated fiction. . ." Krulewitch v. U.S., 336 U.S. 440, 453, 93 L.Ed. 790, 799, 69 S.Ct. 716

This court observed that it is difficult if not impossible, in the case of a confession to prove that the jury did not consider the content of the confession in determining the



the voluntariness of it. Jackson v. Denno, 378 U.S. 368, 12 L.Ed. 2d 908, 84 S.Ct. 1774.

The prejudicial evidence that was improperly brought before the jury in this case is no less harmful than the confession of a co-defendant condemned by the case of Bruton v. U.S. 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476.

The writ should be granted in this case for the purpose of avoiding an erosion of the harmless error doctrine of Chapman v. California through the circuitous logic used by the Supreme Court of Indiana in this case.

CONCLUSION

For all the reasons stated hereinabove, this Petition for Certiorari should be granted.

Respectfully submitted,

FORREST BOWMAN, JR.
Attorney for Petitioner

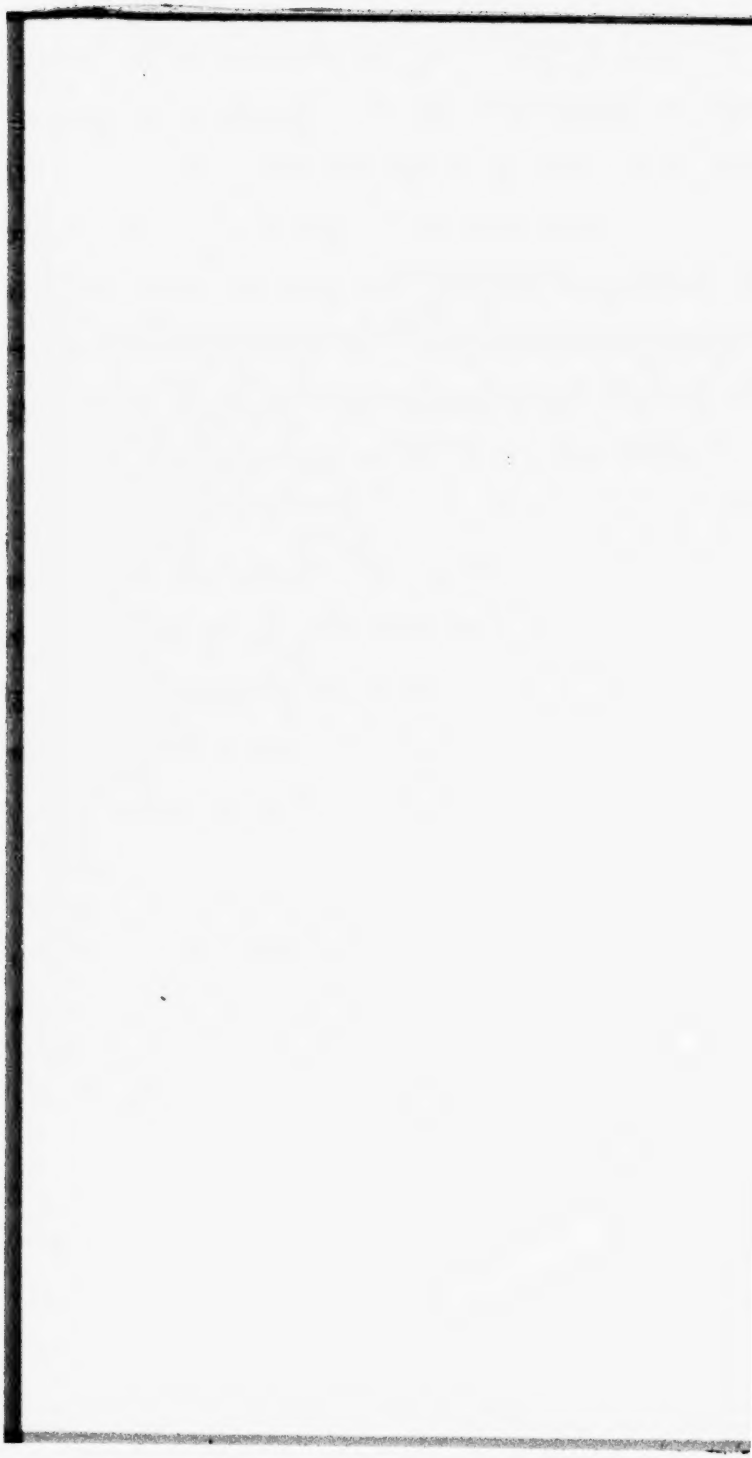


EXHIBIT A

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IN THE

SUPREME COURT OF INDIANA

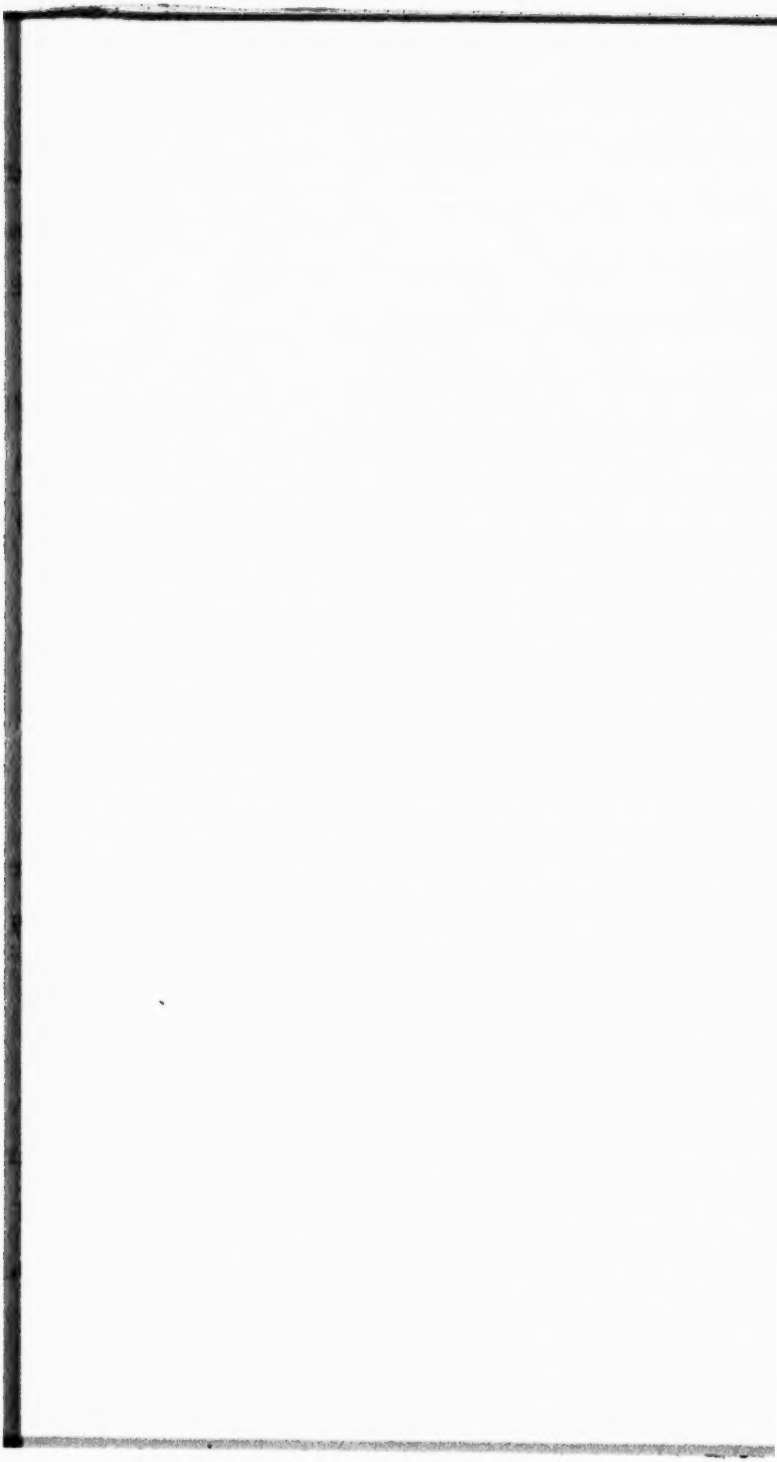
CARL E. HIGHTOWER, Appellant,	)	
vs.	)	NO. 771 S 201
STATE OF INDIANA, Appellee.	)	

APPEAL FROM OWEN CIRCUIT COURT
Honorable William T. Sharp, Judge

DeBRULER, J. -

This is an appeal from a conviction of statutory rape (I.C. 1971, 35-13-5-3, being Burns § 10-4201), after a trial by jury in the

Owen Circuit Court, Judge William T. Sharp presiding. Appellant was originally charged with three offenses: A statutory rape of one Rebecca Gentry on August 1, 1969, an assault and battery with intent to gratify sexual desires on Rebecca Gentry on January 30, 1970, and a statutory rape of one Brenda Gentry on January 31, 1970. All three of these causes were consolidated for trial by agreement of the parties and were submitted to a trial by jury. The jury acquitted appellant on the two offenses alleged to have taken place in January of 1970, and returned a verdict of guilty on the statutory rape of Rebecca Gentry alleged to have taken place in August of 1969. Appellant was sentenced to two to twenty-one years in prison. He bases his appeal on two grounds: One, that the evidence at trial was insufficient as a matter of law to sustain his conviction, and two, that he was deprived of a fair trial as guaranteed to him by the Due



Process Clause because of the alleged misconduct of the prosecutor during his trial.

Testimony concerning the offense for which appellant was convicted was given by Rebecca Gentry. She testified that on August 1, 1969, she went to the Spencer Fair with appellant, her brother and her sister, Brenda Gentry. After attending the fair they all went to some cabins owned by the appellant located nearby to spend the night. Rebecca's brother went to one of the smaller cabins and she and her sister Brenda shared a bed in the bedroom of appellant's cabin. Appellant slept on an extra bed in the living room of the same cabin.

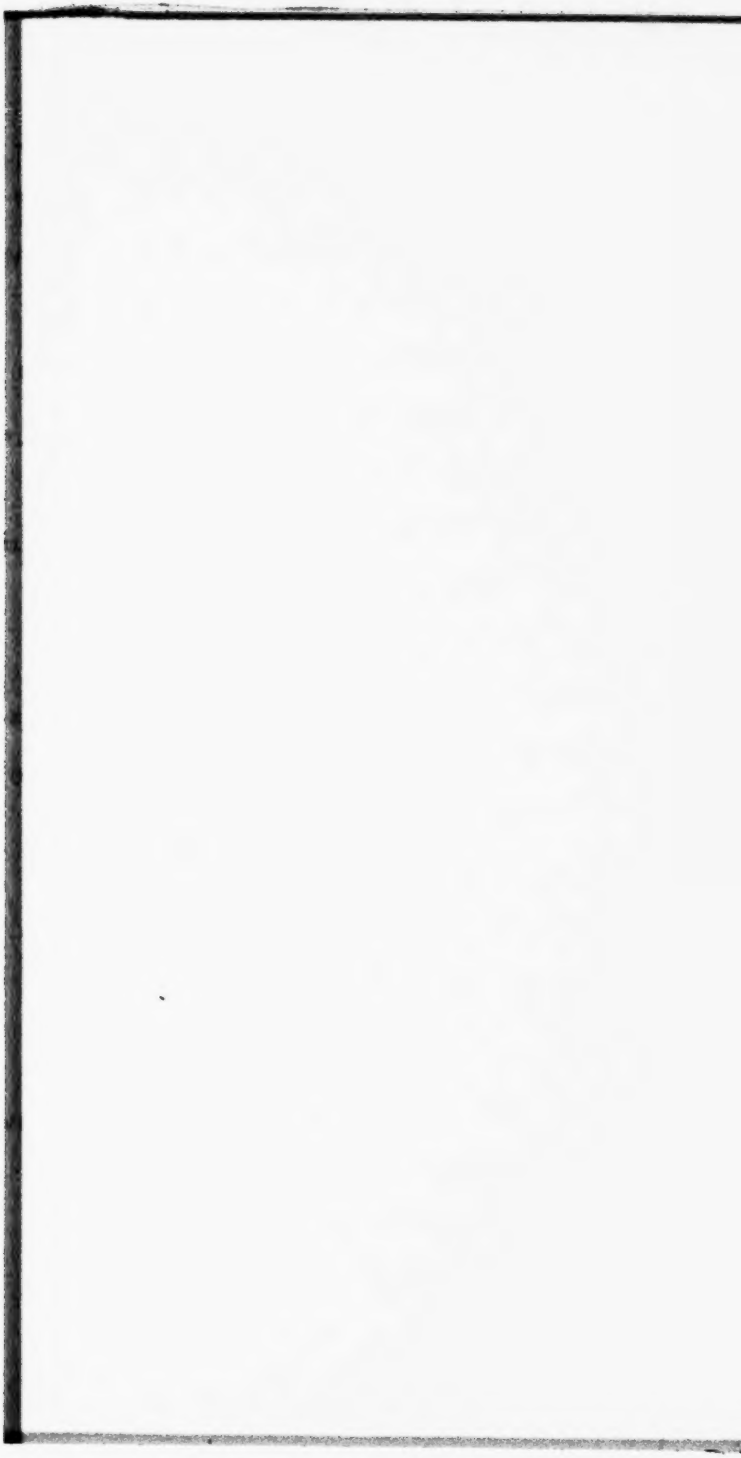
Rebecca was awakened by appellant later that same night getting into bed with her. Appellant began to kiss her. She testified that she attempted to resist appellant but that he held her arms. Appellant then pulled down the pajamas Rebecca was wearing and had

sexual intercourse with her. She testified that appellant, "put his penis in my privates". Rebecca further stated that Brenda then began to stir and appellant got up and went back to the living room. Rebecca testified that she was fifteen years old at the time of the incident.

The statute with which we are concerned here provides in part, "whoever has carnal knowledge of a . . .female child under the age of sixteen years. . .is guilty of rape." (Burns § 10-4201). At the outset we should again establish our function as an appellate court in appeals of this nature. On such an appeal which contests the sufficiency of the evidence this Court will not weigh the evidence nor resolve questions concerning the credibility of witnesses, but will look to that evidence and the reasonable inferences therefrom which support the verdict of the jury.

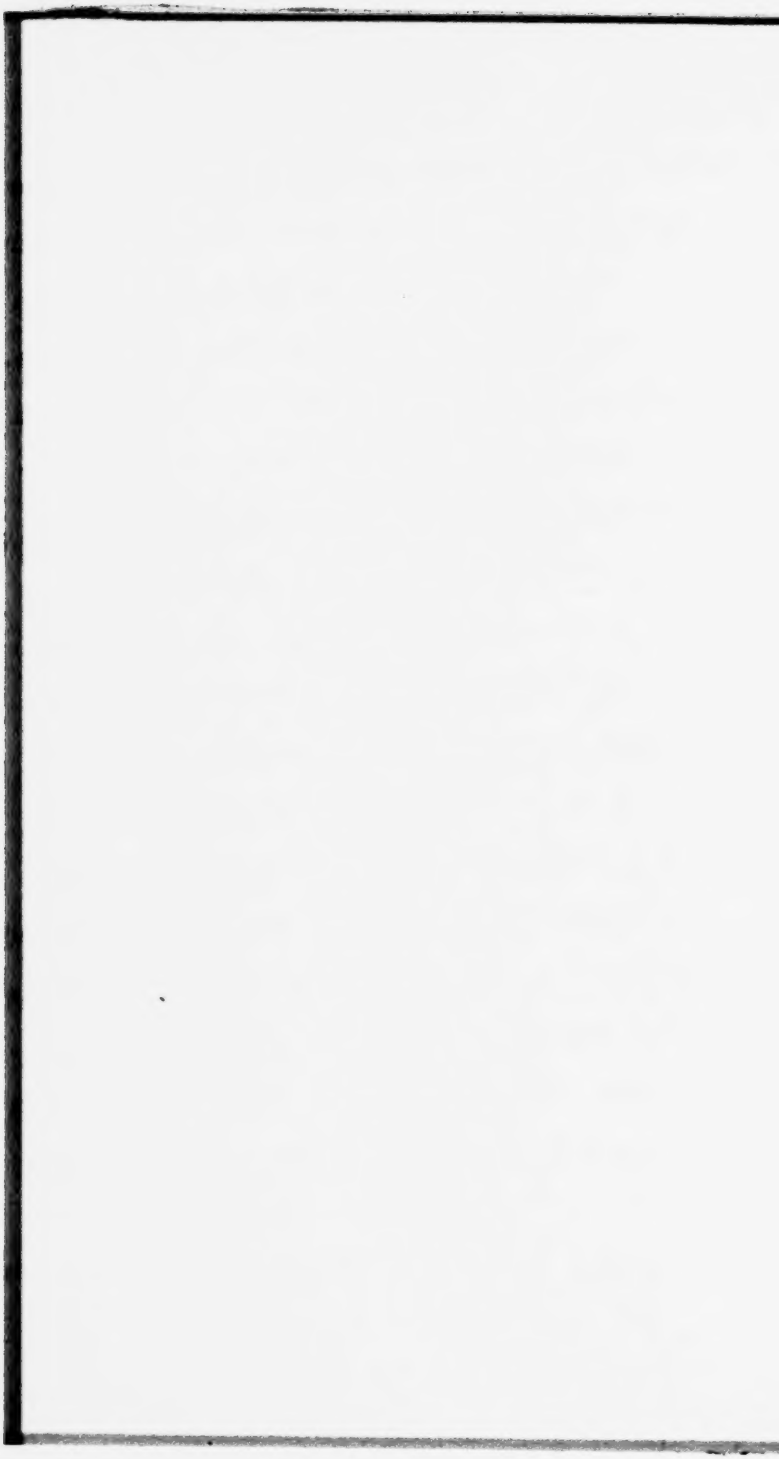
Smith v. State (1970), 254 Ind. 401, 260 N.E. 2d 558. We are required to insure that there is evidence of probative value on each element of the offense from which a jury could infer that appellant was guilty beyond a reasonable doubt. Turner v. State (1972),____Ind._____, 287 N.E. 2d 339.

The testimony of Rebecca Gentry concerning an act of sexual intercourse with appellant at a time when she was fifteen years old clearly establishes the elements of the offense charged. Appellant, however, asserts that the age of the victime and certain contradictions in her testimony concerning the dates of the other offenses charged brings her within the rule of Meadows v. State (1968), 252 Ind. 1, 238 N.E. 2d 281, and makes her testimony, standing alone, insufficient as a matter of law to sustain his conviction. The Meadows case concerned a sole prosecuting witness who had been committed to a mental institution and who



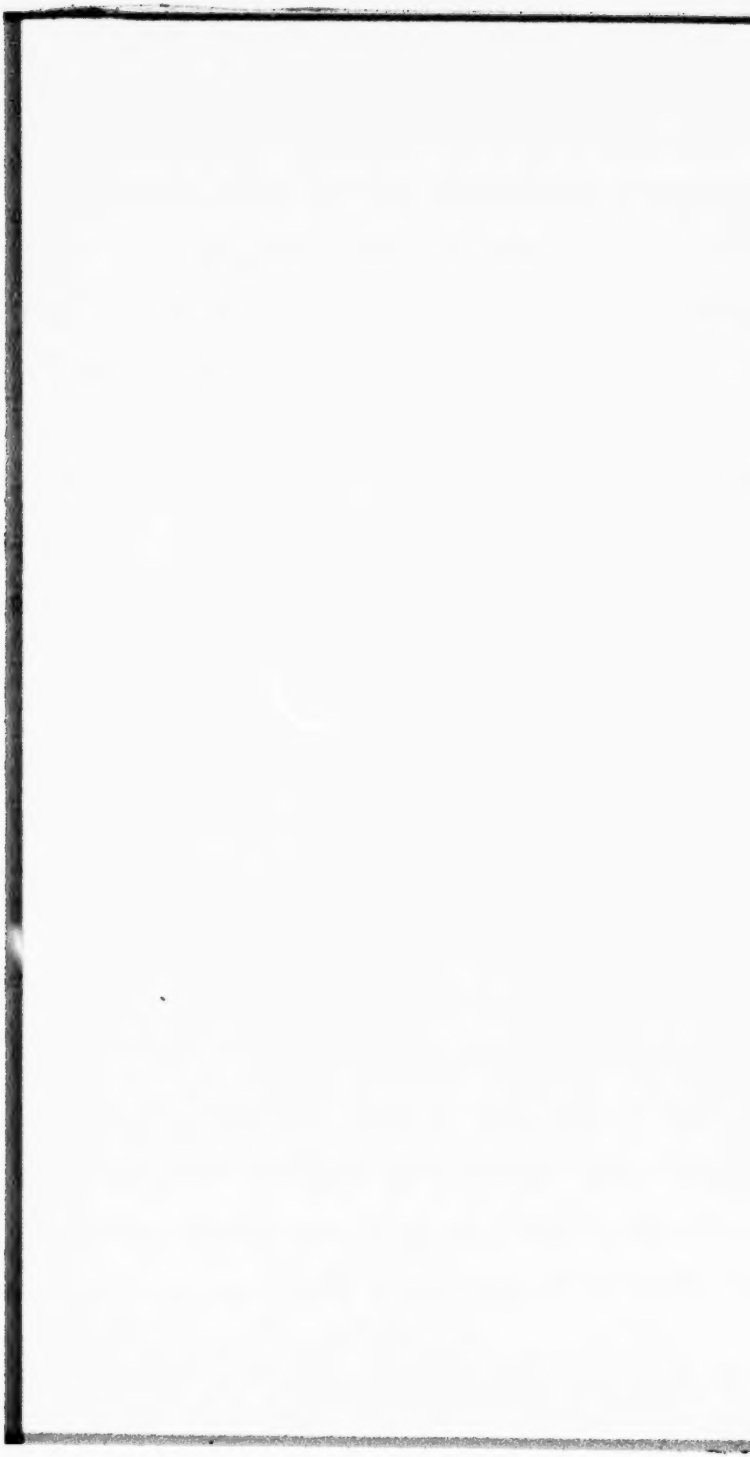
alternately testified from the stand that the defendant had and had not done the illegal acts charged. These facts of the Meadows decision are obviously not analogous to the facts here. The witness in the case at bar has never been admitted to a mental institution, nor did her testimony concerning hte substantive facts upon which the appellant was convicted ever conflict or deviate in any way. It has long been held in Indiana that the testimony of a victim under sixteen, even though uncorroborated, is of itself sufficient evidence to sustain a conviction for rape, provided each and every material element of the crime charged was contained in her testimony. Grimm v. State (1970), 254 Ind. 150, 258 N.E. 2d 407; Montgomery v. State (1967), 249 Ind. 98, 229 N.E. 466; Wedmore v. State (1957), 237 Ind. 212, 143 N.E. 2d 649.

Appellant next asserts that the trial court



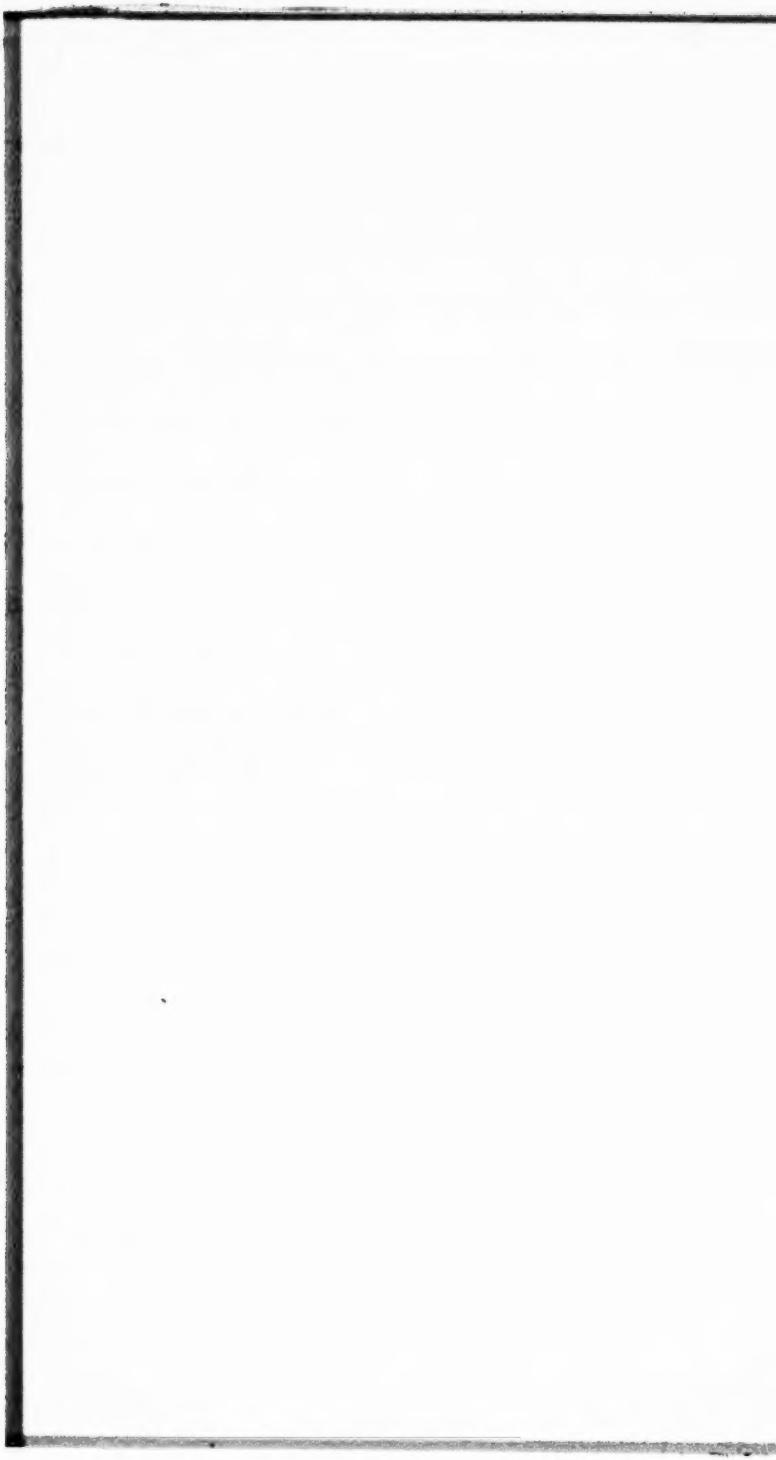
erred in not granting a mistrial because of the alleged misconduct of the prosecutor. Appellant contends that the prosecutor's misconduct during the trial was in its totality so repetitious and prejudicial as to deprive appellant of a fair trial as guaranteed by the Due Process Clause and that the trial court should have declared a mistrial. Appellant's claims seem based primarily on one specific incident concerning the recall of a State's witness by the prosecutor for the purpose of changing her testimony, and two general areas; the consistent use of leading questions and the continued use of questions which could call for hearsay testimony. We shall deal with the specific ground first and the two general areas last.

The first time Rebecca Gentry testified at this trial she stated that on the night of January 30, 1970, she and her sister Brenda went skating at Johnnie's Skating Rink located



near appellant's cabins in the company of appellant. Toward the end of the State's case Rebecca was recalled to the stand by the prosecutor and changed that part of her original testimony concerning the activities of the night of January 30, 1970. She stated that she had been mistaken in her original testimony and that they had gone shopping in Bloomington that night and did not attend Johnnie's. According to Rebecca she became confused because on other week-ends she stayed at appellant's cabins after they had gone skating at Johnnie's. She did, however, reaffirm her previous testimony concerning the alleged assault on her by appellant on that date. On cross examination appellant's counsel established that the prosecutor had approached Rebecca after her original testimony and ask her if she was certain they had attended Johnnie's that night. Rebecca asked her sister and then recalled that Johnnie's had been closed and they had gone to Bloomington instead.

Appellant asserts that his motion for mistrial made at that point should have been sustained because the witnesses Rebecca and Brenda had violated the court's order prohibiting the discussion of testimony among witnesses, and that the prosecutor had acted incorrectly in approaching Rebecca and asking her about her testimony. It might be pointed out that technically the order was not violated since it applied only to witnesses who had not yet testified and both Rebecca and Brenda had already testified when the conversation about Johnnie's took place. In any event it can hardly be said that the remedy for a violation of this court order, if indeed there was one, is a mistrial. There is no reason why this testimony should not be admissible much less require a reversal of a conviction. The jury was completely informed of the conversation between the witnesses after Rebecca's original testimony and was given



adequate information by which it could judge the reliability and credibility of the revised testimony. All of this is in complete accord with the jury's prime function of determining the weight which testimony should be afforded. If the trial court found that the conversation between Rebecca and Brenda had violated its order it could take appropriate steps to enforce it or punish its violation, but it cannot be said that such a violation automatically entitles a defendant to a new trial.

The allegation concerning the role of the prosecutor in Rebecca's revised testimony is also without merit since conversations between attorneys and their witnesses are never barred by court orders such as this one, and the order in this case does not attempt to do so. It is certainly not improper for any attorney to discuss the testimony of his witnesses with

them before or after they have testified. Furthermore this conversation was fully explored on cross examination by defense counsel and the jury was again adequately appraised of this aspect of the revised testimony.

Appellant's allegation that the revised testimony of Rebecca Gentry deprived him of due process fairness is therefore without merit since there was no error, or any impropriety, concerning the admissibility of this testimony at the trial. The more general allegations which appellant makes concerning due process violations arises from the method of examination used by the prosecutor with several of the State's witnesses.

After the opening testimony of Rebecca Gentry outlined at the beginning of this opinion concerning the offenses of August, 1969, the trial focused on the alleged offenses of January 30th and 31st, 1970. The remainder

of Rebecca's testimony concerned occurrances on January 30, 1970, and included collateral testimony by her as to places appellant and she visited that night. Brenda Gentry's entire testimony concerned the alleged offense of January 31, 1970. Two other State witnesses testified as to seeing appellant with the two Gentry girls on the weekend of January 30th and 31st, 1970. Appellant contends that the prosecutor consistently asked leading questions throughout the testimony of these three witnesses. The record does reveal that the prosecutor asked many leading questions during the testimony of Rebecca concerning January 30th, and throughout the testimony of the other three witnesses. It should be noted, however, that appellant's counsel's objections to these questions were consistently sustained and the jury was admonished to disregard the questions and the answers when the answers were given.

Appellant's second general contention is that the prosecutor consistently called for hearsay testimony from another State's witness, the mother of a little girl who also testified at the trial. The little girl testified that in July of 1970, she had been molested in a park by a man who apparently was thought to be appellant, but at trial the girl could not identify the appellant as the man who allegedly molested her. 1/ The prosecution then called the little girls mother to testify about events occurring the next day when she went to the park with her little girl and two detectives to observe appellant. Her testimony concerned her observations the day she was in the park and was generally innocuous and consisted only of relating how appellant had sat down on the bench by her little boy. At this point in her testimony the prosecution

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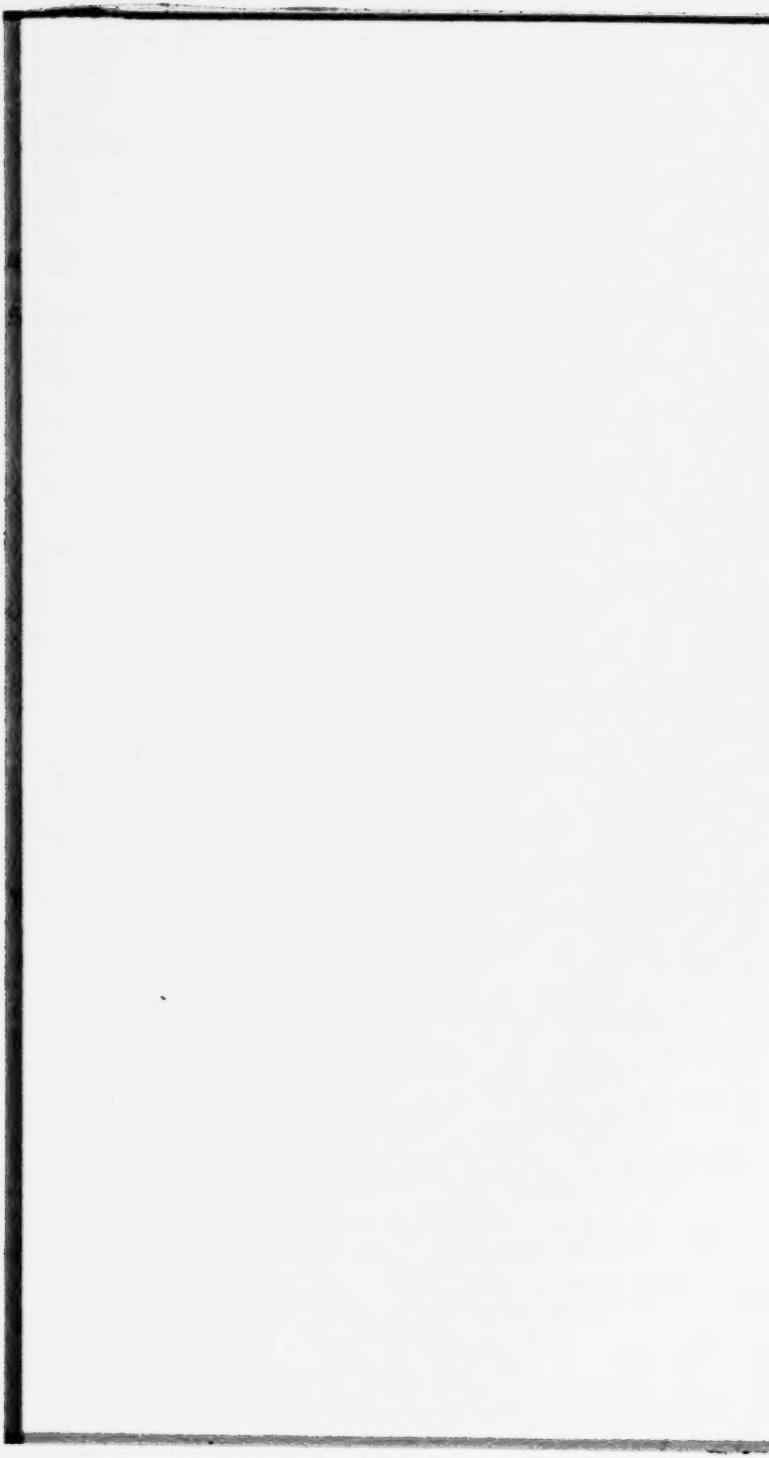
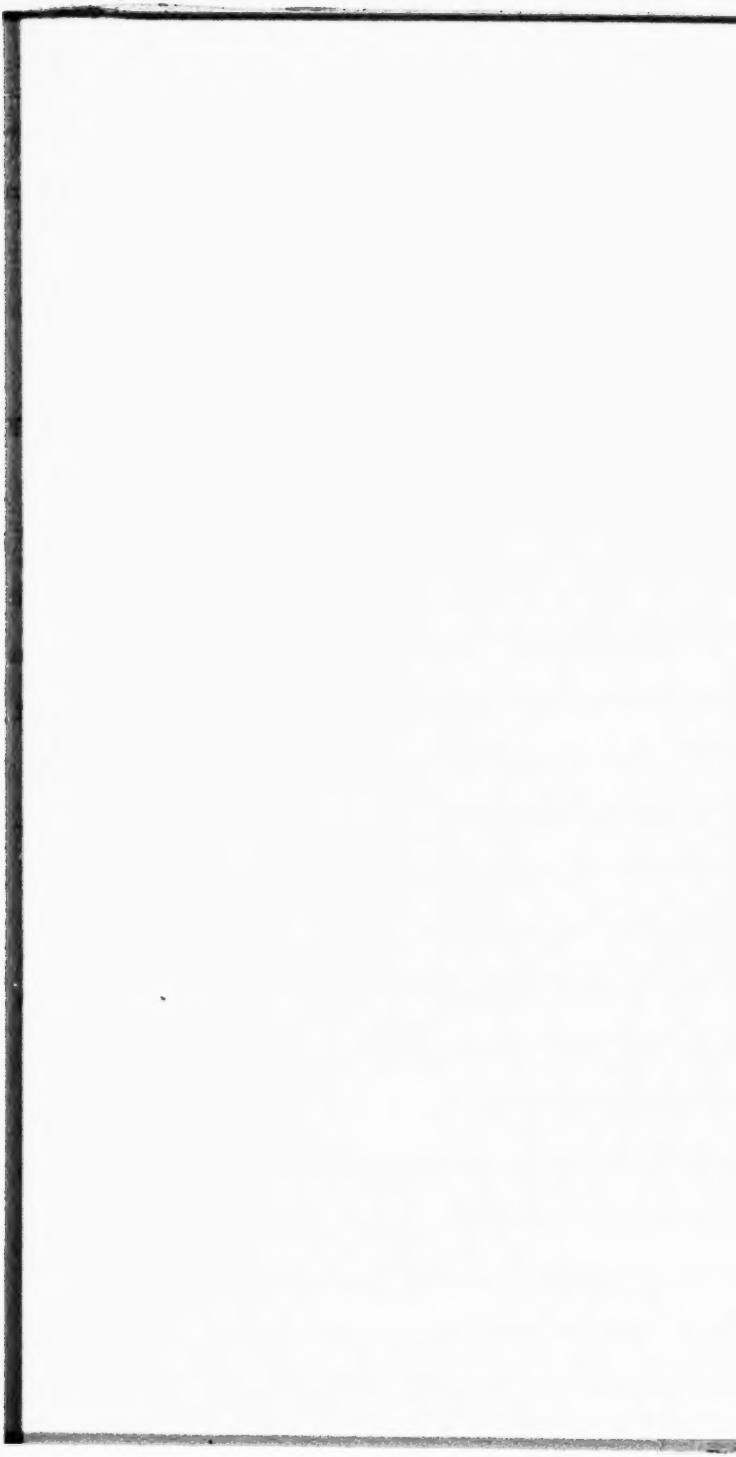
1. It should be noted that we do not rule on the admissibility of this type of evidence here and whether or not it would be proper because of the nature of the charges involved since appellant has not raised this contention on appeal.



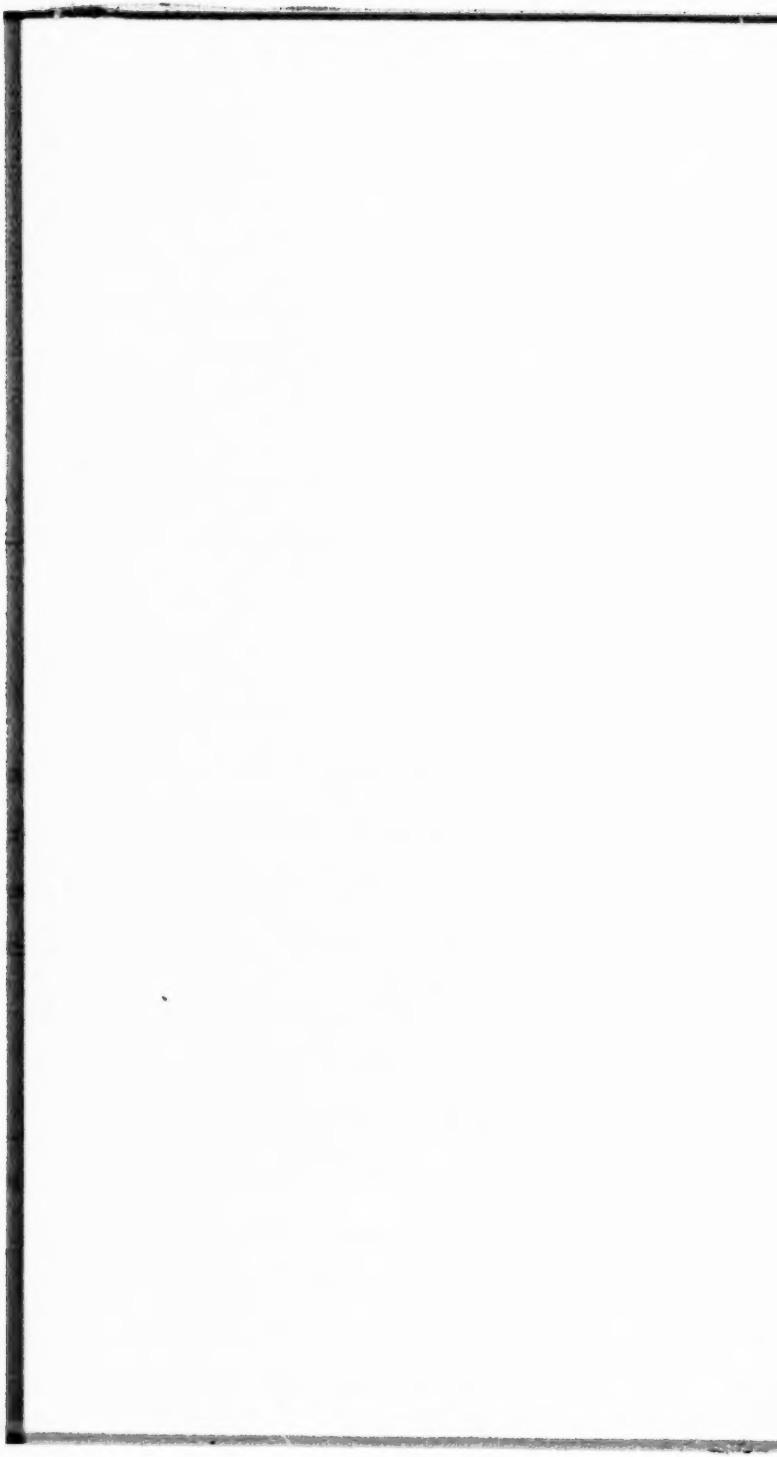
began questioning the witness about what her little girl had told her of the alleged incident in the park on the previous day. Appellant properly objected to each of about four of these types of questions, the court properly sustained all objections and correctly admonished the jury to disregard any answer hastily given.

The aspect of due process that appellant relies on here is the general area of "fairness" in the proceedings of a trial. The contention is that there was error committed by the trial court in not granting a mistrial because this type of questioning by the prosecutor had prejudiced the appellant and deprived him of a fair trial. It must be noted, however, that those instances underlying the mistrial motion are not "errors" committed by the trial court in ruling on these matters. What is actually complained of here are irregularities during the course of trial; a very general theory which is grounded on the assumption that the very number of common and expected objections to simple evidentiary matters can, in



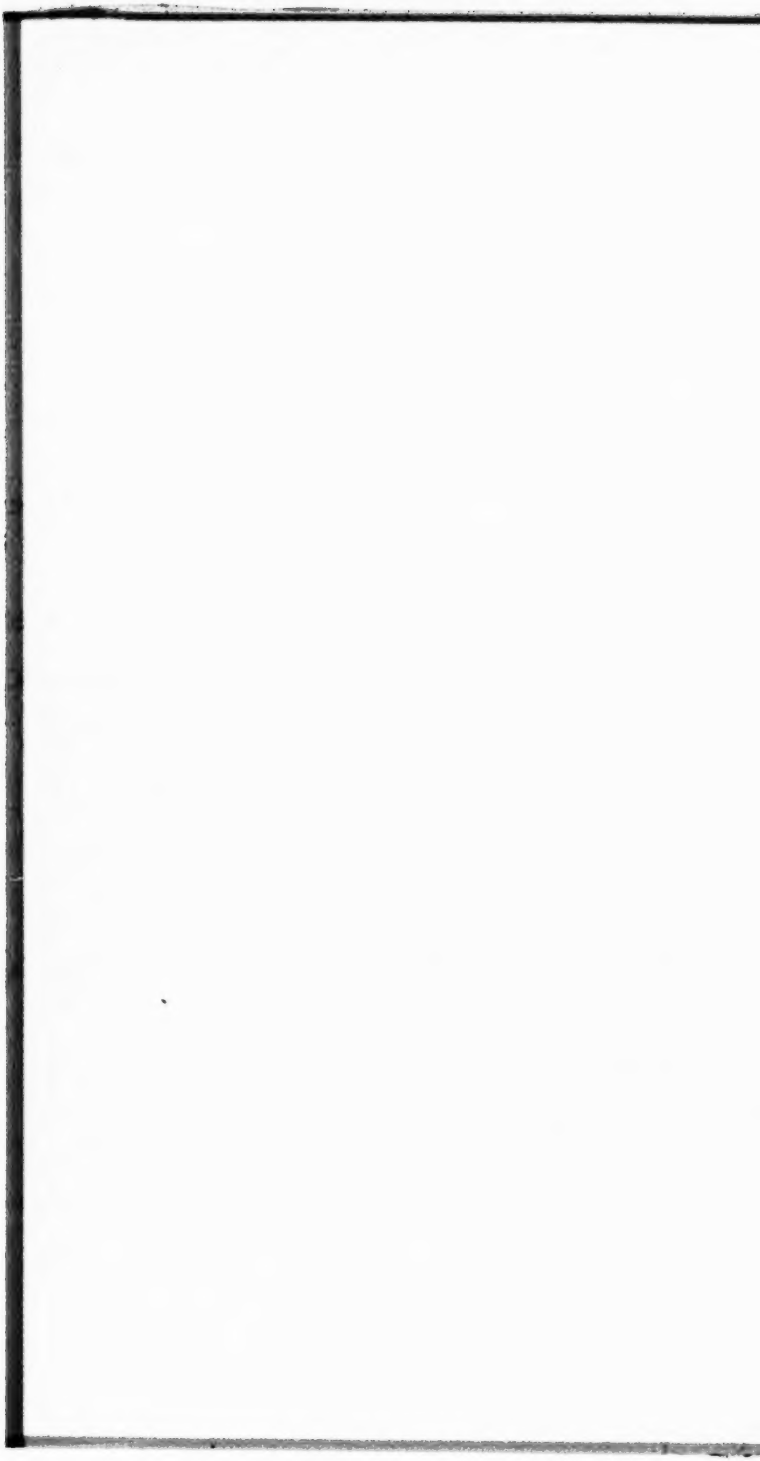
their totality, taint the fairness of a trial and mandate reversal irrespective of the fact that the trial court has consistently ruled in appellant's favor and consistently admonished the jury to disregard any improper evidence.

It must further be emphasized that this appeal is not based on the existence of a constitutional error at the trial in the sense that the irregularity complained of concerned rights secured by either the Federal or State Constitutions. We have held that when such is the case we must weigh the impact of the error on the jury and subject the verdict to a close scrutiny to determine if the error was harmless beyond a reasonable doubt. Chapman v. California (1969), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705; Dillard v. State (1971), _____ Ind._____, 274 N.E. 2d 387. Nor does this case concern the type of evidentiary harpoon of a



highly prejudicial nature which we discussed in White v. State (1971), ____Ind._____, 272 N.E. 2d 312. In that case we held that this Court must be able to say with certainty that such improper evidence did not affect the verdict of the jury, not withstanding the admonition of the trial court to disregard it.

When we are confronted with an appeal such as this, however, which is grounded in general fairness and does not concern constitutionally guaranteed rights or highly prejudicial evidentiary harpoons, it would not be consistent with our function as an appellate court if the mere existence of an arbitrary number of simple leading questions or question calling for hearsay answers would automatically require us to search the record and insure that the jury's verdict corresponded to our general sense of fairness. We cannot be called upon to substitute our sense of fairness for a jury's



sense of fairness on such elastic, arbitrary and general grounds. When irregularities such as this are the ground of the appeal there should be a strong presumption that the jury was able to follow the admonitions of the trial court to disregard any hastily given evidence. In cases concerning an irregularity bearing on a constitutionally secured right or concerning an evidentiary harpoon we do undertake to assess the probable impact of the irr egularity on the final verdict of the jury and we do require a high level of assurance that the irregularity did not affect the verdict before we will affirm the judgment. However, in cases involving simple irregularities as here we may rely on a lower level of assurance concerning the impact on the jury because the likelihood of their effect on substantial rights is much less. If the appellant cannot demonstrate to us that these irregularities have had a discernible and apparent effect on the

verdict of the jury we will not undertake to scrutinize the evidence at trial in relationship to the verdict of the jury and subject it to a test of fairness.

The case here does not demonstrate that the irregularities at the trial have had a discernible and apparent impact on the verdict of the jury. Quite the contrary it is evident that the jury here followed its instructions quite correctly. The evidence as to the offense committed by appellant on August 1, 1969, against Rebecca Gentry was clear and uncontradicted throughout the trial. The majority of the trial was concerned with the offenses alleged to have been committed in January of 1970, and it is within these charges that the alleged irregularities appeared on the record. Appellant offered a partial alibi as to the offenses in January of 1970, through the testimony of his wife, and apparently the combination of the admonishments of the

judge to disregard certain evidence and the alibi testimony submitted by appellant's wife were considered by the jury since they returned a verdict of acquittal on all the charges of January, 1970.

Judgment of the trial court is therefore affirmed.

Arterburn, C.J., Givan, Hunter and Prentice, J.J., concur